116 U. S. 43.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~430.~~ 210

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BEM PRICE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

FILED MARCH 27, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BEM PRICE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

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1 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the judge of the district court of the United States for the northern district of Mississippi, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you, between the United States and Bem Price, a manifest error hath happened to the great damage of said United States, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October next, in the Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 9th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] GEO. R. HILL,
Clerk U. S. Dist. Court for Nort. Dist. of Miss.

2 United States district court, northern district of Mississippi.

Proceedings had in the district court of the United States for the northern district of Mississippi, begun and held for its December term, A. D. 1880, at the court-house in Oxford, Miss., on, to wit: The day of , 187 , and days subsequent thereto, in the following cause:

THE UNITED STATES
v. } 1752.
BEM PRICE.

Greene C, Chandler, U. S. district attorney for the northern district of Miss.

H. A. Barr, of Oxford, Miss., attorney for the defendant.

3 *Petition for writ of error.*

District court of the United States for the northern district of Mississippi.

To the clerk of the district court of the United States for the northern district of Mississippi:

The petition of G. C. Chandler, U. S. attorney for said district, shows that a final judgment was rendered in favor of the defendant, Bem Price,

in the case of U. S. v. Bem Price, on the 2d day of January, 1883, the same being a day of the December term, 1881, of said court, and that the United States feel aggrieved by said judgment, and he therefore prays for a writ of error to the Supreme Court of the United States next to be held, that the said judgment may be renewed, reversed, or otherwise disposed of, and as in, &c.

G. C. CHANDLER,
U. S. Attorney.

Filed Mar. 9, 1883.

G. R. HILL, *Clerk.*

4 *Citation.*

United States of America, northern district of Mississippi.

To Bem Price or H. A. Barr, his attorney of record, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western division of the northern district of Mississippi, wherein the United States is the plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness the Hon. R. A. Hill, judge of the said district court, 9 M'ch, A. D. 1883.

R. A. HILL, *Judge.* [SEAL.]

Executed March 9th, 1883.

J. L. MORPHIS,
U. S. Marshal,
By N. H. BRYANT,
Dep. Mar.

5 *Declaration.*

United States of America, northern district of Mississippi.

In the district court, December term, 1880.

THE UNITED STATES, PLAINTIFF,
vs.
BEM PRICE, DEFENDANT.

1*st count.*—The United States of America, by their attorney, complain of Bem Price, the defendant, who is a resident and citizen of Lafayette County, Mississippi, in the northern district of Mississippi aforesaid, of a plea in assumpsit, that he render unto the United States, for the use of the Treasurer of the United States, the sum of $6,306.46 for so much money had and received by defendant from plaintiffs to and for the use of said plaintiffs before that time at, to wit, on the first day of April, 1875, in the northern district aforesaid, and being so indebted he, the said defendant, then and there undertook and faithfully promised to pay

plaintiff the said sum of money, yet, though often requested, he has not paid the same or any part thereof; wherefore plaintiffs sue & demand judgment, &c.

2nd count.—And the United States, by their attorney, further complain of the defendant Bem Price that he render unto the United States, for the use of the Treasurer of the United States, the sum of $6,306.46, for so much money by said plaintiff paid and advanced to defendant at his special instance and request at, to wit, on the first day of April, 1875, in the northern district aforesaid, and which plaintiffs then and there paid to defendant by mistake, as follows, to wit: The said sum of
6 $6,306.46 was allowed to defendant by the Commissioners of Claims under act of Congress approved March 3, 1871, for property and supplies taken from the administrator of Price, deceased, the father of defendant, for the use of the armies of the United States during the war of the rebellion; and said sum of money was paid to defendant under act of Congress approved March 3, 1875, as heir and legatee of his deceased father's estate, and in the mistake that the said sum was due him as only heir and legatee of decedent, when in truth and in fact the property and supplies so taken for the use of the armies of the United States belonged jointly to defendant and his two brothers and Price, and the said sum of $6,306.46 was distributed among the defendant and his two brothers as assets of the estate of decedent; when in truth and in fact the defendant and his said brothers were disloyal to the Government during the war of the rebellion, and not entitled under the law to recover said sum of money or any part thereof; and thereby defendant undertook & promised to pay said sum of money to plaintiffs, but he has not paid the same or any part thereof; wherefore plaintiffs sue and demand judgment for the said sum of $6,306.46, legal interest, & costs.

G. C. CHANDLER,
U. S. Attorney.

Filed Nov. 22, 1880, & summon issued.

G. R. HILL, *Clerk.*

And afterwards, to wit, on the same day a summon was sued out in said cause in the words & figures following, to wit:

7 *Summon.*

The President of the United States to the marshal of the northern district of Mississippi, greeting:

We command you without delay to summon Bem Price, citizen of the State of Mississippi, residing in the northern district thereof, that he be and appear before the district court of the United States, to be held in the town of Oxford, for the said northern district of Mississippi, on the first Monday of Dec. next, to answer the complaint of the United States of America for the sum of $6,306.46 had & received from plaintiff by said defendant, with interest & costs, and that he do file his plea or defence with the clerk of said court on or before the meeting of the same, or judgment will be given against him by default, and have then there this writ.

Witness the honorable R. A. Hill, judge of the district court of the

United States for the northern district of Mississippi, at Oxford, the first Monday of June, A. D. 1880, and 105 year of the independence of the United States.

Issued the 22 day of Nov., 1880.

[L. S.] G. R. HILL, *Clerk.*

Return.

And upon the foregoing writ the marshal made the following return, to wit:

Executed Nov. 22, 1880.

J. L. MORPHIS, *U. S. Marshal,*
By T. B. WILSON, *Deputy Marshal.*

And afterwards, to wit, on the 8th day of December, 1880, the defendant filed his plea, which is in the words & figures following, to wit:

8 *Plea.*

The United States of America, northern district of Mississippi.

THE UNITED STATES OF AMERICA
v.
BEM PRICE. } No. 1752.

District court at Oxford, December term, 1880.

And the said defendant by attorney comes and says that he did not undertake or promise in manner and form as the said plaintiff hath thereof complained against him, and of this he puts himself upon the country, &c.

H. A. BARR, *Att'y for Def't.*

Filed Dec. 8, 1880.

G. R. HILL, *Clerk.*

And on the 1st day of Aug., 1881, the same being a day of the June term of said court in 1881, said case was continued in the words following, to wit:

UNITED STATES
v.
BEM PRICE. } 1752.

It is ordered by the court that this cause be, & the same is, continued until the next term of this court.

And afterwards, to wit, on the 2d day of January, A. D. 1882, the same being a day of the December term of said court, A. D. 1881, a judgment was had in said cause, which is in the words & figures following, to wit:

9 *Judgment.*

UNITED STATES
v.
BEM PRICE. } 1752.

This day came the district attorney on the part of the United States into open court, and came also the defendant by his attorney, and there-

upon came a jury of good and lawful men, to wit, jury No. 1, who being duly elected, empanneled, charged, and sworn well and truly to try the issue joined between the parties, upon their oath say they find for the defendant.

It is therefore considered by the court that said plaintiff take nothing by its declaration, & that the defendant have and recover of the said plaintiff his costs herein expended.

10 *Bill of exceptions.*

And afterwards, to wit, on the 2d day of January, 1882, a bill of exceptions was filed in the words & figures following, to wit:

UNITED STATES OF AMERICA,
District of North Mississippi:

District court, December term, 1881.

THE UNITED STATES
vs.
BEM PRICE.

Be it remembered that on this the second day of January, A. D. 1882, it being a day of the December term, 1881, of said court, came on for trial and was tried the case of United States v. Bem Price, and after the jury had been empanneled and the case submitted to them the U. S. attorney offered in evidence the record of the Southern Claim' Commission showing the allowance to payment to defendant of the money sued for, and for that purpose only. Said record is in the following words & figures:

UNITED STATES OF AMERICA, TREASURY DEPARTMENT,
December 20th, 1880.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of original papers on file in this Department.

In witness whereof I have hereunto set my hand and caused the
11 seal of the Treasury Department to be affixed on the day and year first above written.

[DEPARTMENT SEAL.] JOHN SHERMAN,
Secretary of the Treasury.

Petition.

To the honorable Commissioners of Claims under act of Congress of March 3, 1871:

This petition of Bem Price respectfully represents that he is a citizen of the United States and now resident of Oxford, Lafayette County, Mississippi; that he was during the whole of the late rebellion a loyal adherent to the cause and Government of the United States, and that he is the sole owner and was the original owner of the claim herein made for the value of property furnished by or taken from your petitioner for the use of and which was used by the United States Army during the late war, and that

said property was furnished or taken by the officers herein named, and at the time and place named:

5,000 bu. corn, @ 60c	$3,000
112,000 lbs. fodder, " 8s	1,120
12 mules " $175	2,100
190 hogs—150 lbs. each, @ 10c	2,850
12 sheep, @ $3	36
20 cows, " $20	400
1 mare	175
50 bushels oats, @ 50c	25
Total value of property	$9,706 00

12 That the prices charged in the foregoing schedule are just and are the fair market values; that he has received no payment for the property thus taken or furnished, nor for any portion of the same; that his claim does not contain any charge for property which was destroyed or stolen by soldiers or other persons, and that this claim has not been heretofore presented to any officer, agent, or Department of the Government, or to Congress, or to any committee thereof.

That your petitioner resided, at the time this claim accrued, in Wake County, North Carolina. Your petitioner hereby appoints Hosmer & Co., of Washington, D. C, attorney to prosecute this claim before the Claims Commission appointed by act of March 3, 1871, or before Congress, or any court, Department, or bureau of the Government of the United States, to prosecute the same to a final issue and procure a draft or certificate for the amount that may be awarded payable to the order of the petitioner, with full power of substitution, hereby ratifying and confirming all lawful acts of said attorney done in virture hereof, and revoking and countermanding all former authority given for the above specified purpose.

Dated at Oxford, Mississippi, this 3d day of February, 1873.

BEM PRICE.

Oath. (*To be written in full.*)

13 BEM PRICE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, and who signed the same; that the matters stated are true of deponent's own knowledge except as to those matters which are stated on information and belief, and as to those matters he believes them to be true. And the deponent further says that he did not voluntarily serve in the Confederate army or navy either as an officer, soldier, or sailor, or in any other capacity, at any time during the late rebellion; that he never voluntarily furnished any stores, supplies, or other material aid to said Confederate army or navy or to the Confederate Government, or to any officer, department, or adherent of the same in support thereof; and that he never voluntarily accepted or exercised the functions of any officer whatsoever under or yielding voluntary support to the Confederate Government.

BEM PRICE.

Sworn to and subscribed before me this third day of February, 1873.

R. W. BLACK,
Chancery Clerk of Lafayette County, Miss.

expect to prove loyalty by the following-named witnesses and others: , residing at ; , residing at ; , residing at ; , residing at ; , residing at . And to prove
14 other facts alleged in this petition by ; S. E. Ragland, residing near Oxford, Mississippi; Warneer Price, residing near Oxford, Mississippi; , residing at ; , residing at ; , residing at .

The petitioner's post-office address is as follows: "Bem Price, Oxford, Lafayette County, Mississippi." The counsel of the petitioner is Hosmer & Co., named in the foregoing power of attorney, whose post-office address is Washington, D. C.

Dated at Oxford, Miss., this 3d day of February, 1873.

BEM PRICE.

(Endorsed on back of paper:) 20490. Feb'y 27, '73. Act of March 3, 1871. Petition of Bem Price, Oxford, Lafayette Co., Mississippi, to the Commissioners of Claims. Nature of claim, hogs, forage, & horses; amount $9,706. Hosmer & Co., attorneys, Washington, D. C.

15 HERNANDO, MISS., *June* 7, 1874.

CHARLES F. BENJAMIN, Esq.,
Cl'k Com'rs of Claims:

SIR: A few days ago I forwarded the claim of Bem Price, of Lafayette Co., Miss. It was taken under authority of your letter of date Dec'r 20, 1873. The witnesses were all white. I asked why some of the old slaves that were on the plantation were not called as witnesses, the reply was that some were dead and the others scattered. I learned of the whereabouts of one Sam Price, and procured a conveyance and went 7 miles into the country and found him old and decrepid. His testimony coincided in most particulars with the other witnesses.

Respectfully, &c.,

M. CAMPBELL,
Special Comm'r.

Act March 3, 1871.

Before the Commissioners of Claims, Washington, D. C.

Claim of Bem Price, of the county of Lafayette, and State of Mississippi. Numbered 20490.

It is hereby certified that on the 3d day of July, 1874, at Oxford, in the county of Lafayette, and State of Mississippi, came personally before me for the purpose of a hearing in the above entitled cause, the fol-
16 lowing persons, namely: Bem Price, claimant; H. M. Sullivan, local counsel: H. A. Barr, T. L. Harris, S. E. Ragland, Welcom Buard, F. A. Perry, Sam Price, witnesses.

Each and every deponent previous to his or her examination was properly and duly sworn or affirmed to tell the truth, the whole truth, and nothing but the truth concerning the matters under examination. The claimant's witnesses were examined separately and apart from each other;

the testimony of each deponent was written out by me in presence of such deponent, who signed the same in my presence after having the deposition read aloud to each deponent, and the signature of such deponent was by me attested at the time it was affixed to the deposition.

Witness my hand and *each* this 4th day of July, 1874.

M. CAMPBELL,
Special Commissioner.

Testimony of BEM PRICE, the claimant, who being duly sworn deposes and says:

My name is Bem Price; I am now twenty-four years of age; I was born March 8, 1850, at my father's plantation (now mine); being 11 miles SE. of Oxford; my principal business is farming, though I am engaged to some extent in merchandizing. I resided in Lafayette County until after my father's death. He died on the 14th day of October, 1855. In 1856 I went with my uncle to North Carolina, where I remained until Oc-
17 tober, 1865; while in North Carolina I was engaged in going to school; during the entire war I was at school; I never aided or assisted the rebellion in any manner, shape, or form; I never took any oath of any kind to the so-called Confederate States. I never gave any information in aid of any person or persons in hostilities against the U. S. Gov't. I was the owner of the property charged in the petition as being taken, and I inherited it from my father. I have never put in any claim for this property previous to the filing of this application; I have never filed a petition in bankruptcy, nor have I ever been declared a bankrupt; no payment has ever been made for any of the property charged in this claim or for any property taken at the same time as the property charged in this claim.

No part of this property has ever been included in my claim presented to Congress or to any court, Department, or officer of the U. S., or to any board of survey, military commission, State commissioner, or officer or any other authority.

BEM PRICE,
Special Comm'r.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of H. A. BARR, who being duly sworn as to the age of Bem Price:

My name is H. A. Barr; my age is 57 years; I am a lawyer by profession; I live in Oxford, Miss.; I have lived here 31 years; I
18 was attorney for claimant's father and executor of the will of claimant's father, and wound up his estate in 1861, and turned over claimant's estate to H. Price, brother of claimant, who was his guardian.

The said H. A. Barr produced a Bible containing a family record of the said Washington Price, father of the claimant, and states that he knows that the said record is the family record of the said Washington Price; that he himself, the said H. A. Barr, entered in said family record the death of the said Washington Price at the request of his wife, who survived him, and that he also entered in said family record the death of his wife, when

she died, at the request of members of his family; the said entries now appear in said record in my handwriting and segned with my initials.

The said family record proved by the said H. A. Barr to be the family record contains this entry, to wit, "Bem Price was born March the 8th, 1850."

I am well acquainted with S. E. Ragland, F. A. Perry, and Welcome Baird, and know them all to be men of truth and veracity and entirely reliable in every way. S. E. Ragland was overseer or manager of the estate of Bem Price for several years during the war, and some time after the war he mentioned to me that he had a list of all property taken from the place by the Federal soldiers during the war.

19 I am not related to the claimant, nor have I any interest in this claim.

H. A. BARR.

Attest:

M. CAMPBELL,
Special Com'r.

BEM PRICE, the claimant, being recalled by counsel and duly sworn, deposes and says that he had a large amount of property taken which is not included in his petition and which would have made his claim amount to between 15 and $16,000, and which was taken at the same time as the property claimed in his petition, and that his reason for not putting in a claim for the whole amount was that it would necessitate the taking of his witnesses to Washington at a large expense, and further, that some of his witnesses were so situated that they could not go to Washington and that he does not intend to put in any further claim, and hereby waives his right so to do.

BEM PRICE.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of T. L. HARRIS, as to the age of Bem Price, who, being duly sworn, deposes and says:

My name is T. L. Harris. My age is 45 years. My occupation is a merchant. I live in Oxford, Miss. I have lived in Oxford and in Lafayette County since 1848. I am an uncle to the claimant, Bem Price; his mother was my sister. I have no interest in the world in this claim.

20 I was married on the 6th day of June, 1850, and on the next day I went with my wife to the house of the claimant's father and there saw the claimant, who was a baby of not more than 4 or 5 months of age. I have known claimant ever since. I saw but very little of claimant until after the war, when he returned here. He was then only a stripling of a boy and too young to have been in either army. I never heard of his being in either army, and am satisfied that he never was in either army.

T. L. HARRIS.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of S. E. RAGLAND as to age of Bem Price. After being duly sworn, deposes and says:

I have known Mr. Bem Price ever since he was an infant. I have lived in Lafayette Co., Miss., since 1835. I knew claimant's parents before he was born, and lived a neighbor to them. I do not know the exact year that claimant was born. Claimant's uncle came in the fall of 1855, after claimant's father died, and took claimant to North Carolina, where he remained until after the war. When he returned here at the close of the war he was still nothing but a chunk of a boy, and was not over 15 years old at that time.

S. E. RAGLAND.

Attest:

M. CAMPBELL,
Special Com'r.

21 Testimony of WELCOME BEAIRD as to property:

I am 66 years of age. I am a farmer by occupation. I live two miles east of Oxford, in Lafayette Co., Miss. I have lived in this county fifteen years. I have known the claimant since the close of the war. Before and during the war I lived within one mile of the claimant's place, 12 miles southeast of Oxford, Miss. Mr. Price has a large place. I do not know how many acres he has; his place was well improved and well cultivated. He had plenty of stock and provisions. In the fall of the year 1862, when Gen. Grant's army laid at Oxford, a command of the Federal soldiers came down into our neighborhood and foraged and then went back, and more came the next day. They kept coming this way for eight days, when there was nothing left in the country. I know that everything was taken that claimant had except about 40 or 50 bushels of corn. The list of property claimed by Mr. Price to have been taken has been read over to me. I did not see any of it taken, but know that he had the amount claimed and much more when the Federals came, and I know that it was gone when they went away, and I saw the Federal troops on the place of claimant. There looked as though there was two or three companies of cavalry. The negro slaves told me that there was one hundred wagons there. The negroes said the wagons were there to haul
22 off what "stuff" there was there.

The evening that the Federals first came to claimant's place I was there, as was also Mr. S. E. Ragland, who was manager and in full charge of the plantation. I have known Mr. Ragland for 12 years; his character is as good as that of any man in the country, none have any better character. When the Federals came there they were under command of officers. I met one and talked with him. I asked him if he was an officer, and he said he was a lieutenant, as near as I remember. I asked him where he was from. He said he was from Wisconsin. I told him he was a long ways from home. He said that they made it *there* home where ever they stopped. I am not related in any way to the claimant, and I have no interest in this claim. The corn was in the shuck, and was in the crib when taken, and was good merchantable corn. I do not know anything about the age of the mules; they were all large fine-looking mules; from their appearance I should judge that they would now be worth from

150 to 175 dollars apiece. They were a very good lot of mules. Claimant had a large number of very fine hogs in a lot at his mill. I do not know how many he had. They were in good order, and would average 150 lbs. each. They were all killed and taken away. I saw the blood and entrails lying about the lot after the Federals went away. Claimant had a large amount of fodder. I do not know how much he had,
23 but am satisfied that he had more than he has claimed. He had none when they left. I know that claimant had some oats. I know that he raised oats; do not know how many, if any, were taken. The fodder was in the stable loft and barn. I do not know the quantity. I do not know where the oats were. I know, from hearsay, that the whole of the forage was brought to Oxford for the use of the army. I could hear the drums from my house every night.

his
WILCOME + BIEARD.
mark.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of F. A. PERRY as to the taking of the property:

I am 45 years of age; am a farmer by occupation; I live southeast of Oxford, in Lafayette Co., Miss. I have lived at this place since Jan'y, 1861. I live three miles from claimant's place. I have known claimant since about May, 1865. Claimant has a large place, with a great deal of open land in cultivation. He had plenty of slaves, stock, implements, and provisions to run the place well. Late in the fall or winter of 1862 the Federal soldiers came into our neighborhood. I saw a large number of soldiers on the claimant's place. I suppose there was 50 or 60 of them; they had about ten large wagons with them; I saw them killing hogs, and clean them, and load them into the wagons; at the same time they were loading the wagons with corn from the cribs; when they got the
24 wagons loaded they drove off towards Oxford, where the army was camped. I do not know how much they took. This is all the property that I saw taken. I was very intimate with Mr. Ragland, the manager of the plantation, and I was frequently at the place.

I have heard read over a list of the property that is claimed was taken. I know that the claimant had all of the property therein enumerated except the "mare"—I do not remember her. He had at least 5,000 bushels of corn; it was in the "shuck," and was in good, dry cribs, and in good order. All of this was taken except about two loads—say 50 bushels that was left scattered on the ground where they loaded. I do not know how much fodder there was, but I am satisfied that there was more than the claimant has charged in his petition. Some of the fodder, if I remember rightly, was in stacks and some in the stable loft; it was all well put up, and in good condition. I do not recollect of seeing any fodder left after they went away. The mules were what I would term "good, average mules." I do not know their ages, but do not think that they were old mules; they were good, average mules of the country. I did not see them taken, but know they were on the place when the Federals came, and that

they were gone when they left, and I was told that "the Yankees took them."

From my personal knowledge, I know that the claimant had a large number of very fine fat hogs; part of them were in a pen at the
25 mill, where I frequently saw them. The old miller, named "Gabe," told me that there was "two hundred" in the pen or lot. They were well fed and in good order. They had been kept up for some time, and fed regular; they had corn lying by them every time that I saw them; I am satisfied that they would have averaged 150 lbs. each. I saw some of them killed and taken off in wagons by Yankee soldiers; and when the Federals left the neighborhood all of the hogs were gone. I do not know anything about the sheep; don't recollect of ever seeing any.

I know that the claimant had more than 20 cows, and know that they were as good as the average through the country; they were worth $25 per head. I do not know of their being taken, except by hearsay. They were there when the Yankees came, and when they left they were gone.

I do not remember the claimant's having a mare. I know that claimant raised a crop of oats that year, and know he had some oats, but how many I do not know; I know that they had none when the Federals left. I do not know whether any vouchers or receipts were asked for or given. I never knew of any payment being made for any part of this property; I never heard of this property, or any part thereof, being included in any other claim than this. My understanding was that this property was taken by the army which was encamped near Oxford under Gen. Grant.

I know there was officers along in command of the troops when this
26 property was taken, as I saw them with straps on their shoulders. I do not know to what command or State they were from; the wagons that I saw were what is known as army wagons. The portion of the property that I saw taken was taken about 11 o'clock a. m. The officers were present when the property was being taken, and, from what I could see, they were authorizing and directing the taking. When the wagons got loaded they drove up near the gin-house, and the soldiers fell into ranks and marched off behind the wagons; the guard that formed behind the wagons were cavalry. There were some men along on foot who done the loading.

All of the property that I saw taken and all that I heard of being taken was taken in daylight and taken openly. I did not measure the corn, and my means of judging is from the amount of land that was cultivated in corn and from the size of the cribs. I did not hear any complaint made about the taking of this property, but heard that Mr. Ragland complained to the officer in command and told him that he ought not to take all, but leave some for the family to live on. I do not know the number of acres of land that was in corn that year. The cribs were about 40 by 20 feet, and fifteen feet high; there were two of the cribs, and they were both full or nearly so; it was soon after the corn had been cribbed. There was also a passage between the cribs, about the same size as the cribs.

This was boarded up at each end and filled with corn. There
27 was also corn in some sheds attached to the mule stables. I think that the two main cribs first mentioned would hold about ⅓ of the

corn that I knew to be there, though there may have been other cribs that I did not know of. I am not related to the claimant in any way, nor am I interested in any manner in this claim.

F. A. PERRY.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of S. E. RAGLAND, as to property:

My name is S. E. Ragland; my age is 63 years; I am a farmer by occupation; I live 15 miles SE. of Oxford, in Lafayette County, Mississippi; I have lived [in] Lafayette Co. since 1835. In 1862, about July, I took charge of the plantation and property of the claimant, who was then a minor, under the guardianship of his brother, H. Price. I lived upon the plantation, which is located eleven miles SE. of Oxford. I do not know the exact number of acres in the plantation, but think there is about 1,500 acres in the place; there was at least 400 acres of the place open and in cultivation; there was about 310 acres of the place in corn; there was about 60 acres in oats; the balance was in wheat, peas, &c. There was no cotton cultivated on the place this year; we were trying to make something to eat, which we did, but lost it. In December, 1862,
28 after all of our crop was gathered and housed, a command of Federal soldiers came out to the place. I think there was a regiment of infantry with wagons that came on the 2nd day.

There was also a large command of cavalry, which came in the advance and put out pickets. The cavalry took 20 mules from the place. They rode some of the mules in place of their horses; some they led off, and some were drove along. They carried them off towards Oxford, where they were camped. I never got any of those mules back, nor did I receive any pay for them. The mules were a good average of the country. The next day the cavalry returned, and with them a regiment of infantry, with wagons. The cavalry scouted around the country and put out pickets before the infantry came. There was a very long train of wagons; I do not know how many. While one part of the command were loading the wagons with corn, another portion was killing and dressing hogs; and others took possession of the mill and ground up everything that there was about it and took it off. They continued to come every day with their wagons for about a week and haul away until everything was gone except a little corn that they left on the ground where loaded. I had this picked up and saved, and it was all I had left. There was no stock or provisions of any kind except about 40 or 50 bushels of corn left on the place
29 when they left, or rather when they quit coming. I saw officers along and in command every time that they came out. There was an officer there that they called "major." I think the major was there twice. I saw plenty of captains and lieutenants. I understood that they belonged to Gen. Grimsby's command of Gen. Grant's army. There was none of this property taken in the night-time; it was all taken in daytime.

I made complaint to several officers about the taking of the property. I told them that it belonged to a minor, and that they ought not to take it. I do not know the names of the officers that I went to; one that I talked to was a quartermaster; he talked very cleverly, but

said that they had to have the property, and it was no use for me to make any trouble about it, and they still kept on taking it. I asked for receipts, and the quartermaster said he had no objection to giving them, but went off without doing so. I don't know the reason that they did not give me receipts. I thought when he got all there was that he would come up and give the receipts. Some of the soldiers abused me so that I kept away from about them as much as possible. On the first day when they came I had hid the mules out so that I did not think that they could find them, but the negroes told them and went and showed them where they were. At the house I had my own horse and the mare described in the petition. While I was talking to some of the officers, some soldiers came along
30 with my horse and the mare mentioned in petition. I objected to their being taken, and the officer gave me a receipt for the mare, which I have lost or mislaid. He would not give me a receipt for my horse, but offered me a broken-down horse for mine, which I would not take; he said I had better, and made so light of it that I got disgusted and went off to the house, and there found that they had taken all of the mules and gone off. My object in getting a receipt was to be able to account for the property left in my charge. I became satisfied that the officer was only talking to me to keep me quiet while his men took what they wanted. I told the officer that the mare belonged to an orphan and that I was accountable, and that I wanted a receipt to show what became of the property. He did not object to giving the receipt. I did not get to see the officer after I found that the mules were taken. I do not remember of seeing the receipt since the war. I lost a large number of my own papers and I think that it was with them. There has not been any payment made for any property charged in this claim nor for any other property taken at the same time. I do not know of any of this property ever having been included in any other claim for payment. This property was taken by troops camped in the vicinity of Oxford. There had not been any battle or skirmish in the immediate vicinity of the place. I
31 have heard the items in claimant's petition read over, and know that the items and quantities claimed were taken, as I have a copy of memorandum, made in my book at the time for my own protection, and which is hereto attached, marked Exhibit A.

When I made the memorandum I had no idea that it would ever be used for this purpose. I took it so as to protect myself in accounting for the property left in my charge. The corn was gathered and in cribs; some was shucked and some was in the shucks; as near as I remember about ⅓ was in the shuck; the corn was in the cribs. There was 1,000 barrels of corn or 5,000 bushels. I estimated it by the cribs and by the amount of land that was planted in corn; the corn was in two large cribs and in the passage between the two cribs, and in an old negro cabin. The cribs were about 18 feet wide by 40 long and 10 feet high each. The passage between the two cribs I had boarded up; it was 23 feet by 18 feet and ten feet high, besides all the room under the roof from the eaves up. The cabin that had corn in it was about 16 by 18 feet and 10 feet high. The cabin was full up to the eaves of the house. The cribs were piled up as full as it could be to the roof. The corn was in good order and was put up so, as I saw to it and had it done myself. Corn in the condition this was was worth in United States money at this time $1.00 per bushel. The

property was taken off in wagons in the direction of their camps,
32 in the vicinity of Oxford. The fodder was gathered without any rain, and was in as good order as I ever saw; most of it was in the loft over the stable and under the shelter lofts. I made my estimation of the amount from my experience as an overseer most of my life, and from hauling it in, and also from the amount of land that I cultivated in corn, and I considered it a low estimation. The fodder was worth at the time in U. S. currency $1.00 per cwt. The mules were young and in good condition. After they were taken I bought 22 mules to supply their place, and had to pay from 175 to 250 dollars apiece for them, and did not get near as good mules. The mules taken could not, at that time, have been bought for $175 apiece in U. S. currency. As near as I remember, I had 216 head of hogs in a lot at the mill, where had them fattening; when the Federal army came they were ready to kill. They killed and took all of them. There was also about 35 head of hogs in a pen around the corn cribs near the house; they also killed and took these away. Some of the hogs would have weighed 300 pounds apiece, while some would not have weighed over 125 lbs. They were all fat & I would have killed them if I could have got salt to save them with. I think the lot would have averaged 175 lbs. each. I know that there was more here than I have stated, as I counted them frequently, and a part of them I fed every day. I am satisfied that they were worth 10 cents per pound in U. S. currency. Claimant had fifteen
33 head of sheep; they were very fine and fat. The soldiers caught the sheep and put them into the wagons and drove off towards the Federal camps. The sheep were worth three dollars per head. I know how many there was of them from seeing them every day and taking care of them. They were so fine that I petted them and was anxious to raise some of them.

Claimant had a large number of cattle. They were in good order and condition. I saw the soldiers drive off about 35 head of cattle, but some of them came back until there was only 20 head missing. The cattle were in good condition for beef, and on an average were worth for beef $20 per head. The mare was about 7 years old, and was in good condition, and was used for breeding purposes. She was of good stock and was worth $200.

I had threshed out and put away 80 bushels of good oats in the wheat-house for seed. They were fully ripe and were in good condition, and 50c. per bushel is a low estimate for their value, as I had to pay $1.25 and $1.50 per bushel for seed the next spring. I know the quantity, because I threshed them out and measured them myself.

My estimate, made in Exhibit A are made on the gold basis as existing before the war, and I consider them very low.

There was a large amount of other property taken: Some meat,
34 some wheat, some blacksmith tools, and various other things which no claim has been made.

There never was to my knowledge any soldier or soldiers at the place taking property unless there was an officer or officers with them.

I am not in any way interested in this claim, nor am I in any way related to the claimant. Bem Price, the claimant, was the owner of the property that is claimed in the petition. He was a minor and inherited it

from his father, Washington Price, who died in 1855. The claimant has never been through bankruptcy. I do not live on claimant's land, but live on my own place. I own 3,000 acres of land lying five miles from claimant's place. I am not indebted to the claimant, nor is he to me. Claimant is a man of large property and in good circumstances and could get along without this claim, but it is his right and I think that he ought to have it.

S. E. RAGLAND.

Attest:

M. CAMPBELL,
Special Com'r.

Testimony of SAMUEL PRICE as to the taking of property, who, being duly sworn, deposes and says:

My name is Samuel Price; I am about 56 years old; I live 6 miles north of Oxford, Miss.; I have lived in this county ever since I was a boy; I am a farm hand; I was a slave until the close of the war and belonged to the claimant's father; I do not live on claimant's land now, nor am I in any way indebted to him. In the early part of the war
35 a large number of Yankee soldiers came to the claimant's place, in the south part of this county, on Yokonee River; some were on horseback and some were in wagons; they came there about 11 o'clock in the forenoon. We heard that the Yankees were coming, and I and two or three other boys too' 23 mules down into the bottom in the cane to hide them; one old mule named Dave would not go, so we had to leave him behind. The Yankees followed us right into the bottom and took the mules; they drove them down to Ben Nabor's and into his lot and caught them and took them off; they were as good mules as one could find in the State.

I saw the Yankees go to the cribs and fill up 30 wagons with husked corn and drove it off towards the Federal camps. We had all of our cribs full and two rail pens full besides. The Yankees kept coming nearly every day with their wagons and hauling away corn until it was all gone, except about three loads. I do not know how much corn there was. That year we raised nearly 400 acres of corn; it was good corn and put up in good order. I think that our crop of corn would have averaged 25 bushels to the acre all around. We pulled all the fodder that there was raised on the 400 acres of corn and put it up in good order and without rain. We had it put up in the fodder barn and in the stable loft. I have no idea how much fodder there was; there was a mighty big pile of it. The Yankees took two large loads of it; the balance we used our-
36 selves for our cattle, and we had plenty of fodder until fodder came again. We had about 150 head of hoggs fattening at the mill and about 200 head at the house. They killed and cleaned all of them and took them off except ten of them that they told us to take after they had killed them. These hoggs were fat and ready to kill. I think they would average 200 pounds apiece. I was right there and saw the soldiers load these hoggs up into the wagons and drove them off towards their camps near Oxford.

I don't know of their taking any cattle. Claimant had 30 head of sheep, as near as I remember; they were very good sheep. They drove them up into a pen near the house and killed and skinned them, then loaded them

into wagons and drove them off towards Oxford. I do not know what sheep were worth.

They also took one chestnut sorrel mare that belonged on the place that Mr. Ragland, the overseer, rode. I think the mare was about 10 years old. She was a very fine animal. I do not know her value. They took a quantity of shelled oats that we had put away. I don't know how many there was of them.

When the Yankees were taking this property there was officers present with them and saw them take this property. From the way they acted I thought that the army needed the property and came and took it for the use of the army. I don't know whether any receipts were asked for or not. I don't know whether any receipt was given or not for the property. I have no interest in this claim.

37 SAMUEL his + mark. PRICE.

Attest:

ROBERT STOCKNEY,
M. CAMPBELL,
Special Com's.

The amount of forage, stock, &c., taken by the United States Government from H. Price's (guardian of Bem Price) place at the time of Grant's advance to Oxford, Miss., in the fall of 1862:

Corn, one thousand barrels	5,000 00
Fodder, two hundred thousand pounds	2,000 00
Mules, twenty, $150 each	3,000 00
Hoggs, two hundred & fifty, pork 175 lbs. each, 33,750 lbs., @ 10c	3,375 00
Sheep, fifteen head, $3	45 00
Cows, twenty head, $20	400 00
Mares, one	200 00
Oats, eighty bushels, 80	40 00
	14,060 00

I, S. E. Ragland, do solemnly swear that the above is a true copy of a memorandum made by me in my % book at the time of the taking of the property described in the claimant's petition.

S. E. RAGLAND.

Sworn and subscribed to before me this 30th of June, 1874.

M. CAMPBELL,
Special Com'r.

38 No. 20490.

Before the Commissioners of Claims, under act of Congress of March 3, 1871.

In the matter of the claim of Bem Price, of Oxford, in the county of Lafayette and State of Mississippi.

Comes now the claimant before Marion Campbell, esq., special commissioner for the State of Mississippi, and represents that he has heretofore

filed with the above-named Commissioners a petition for the allowance of a claim for property taken for the use of the Army of the United States, which claim, as stated below, does not exceed the sum of five thousand dollars.

That the said claim, stated by items, and excluding therefrom all such items as refer to the damage, destruction, and loss, and not the use of property; to unauthorized or unnecessary depredations of troops and other persons upon the property, or to rent or compensation for the occupation of buildings, grounds, or other real estate, is as follows:

No. of items.	Quantities & articles.	Value.
1	5,000 bushels corn, *a* 60c	3,000 00
2	112,000 lbs. fodder	1,120 00
3	12 mules, *a* $175	2,100 00
4	190 hogs, 150 lbs. each, *a* 10c	2,850 00
5	12 sheep, *a* $3	36 00
6	20 cows, *a* $20	400 00
7	1 mare	175 00
8	50 bush. oats, *a* 50c	25 00
	Total	9,706 00

39 That, as stated in the petition we found to the property in question was taken from or furnished by of in the State of for the use of a portion of the Army of the United States known as and commanded by and that the persons who took or recovered the property, or who authorized or directed it to be taken or furnished were the following:

Name.	Rank.	Co.	Regiment, corps, or station.

That the property was removed to and used for or by . All this on or about the day of in the year 186 , as appears by the petition presented to the commissioners. That by the following named persons, the claimant expects to prove that from the beginning of hostilities against the United States to the end thereof, his sympathies were constantly with the cause of the United States; that he never of his own free will and accord did anything, or offered, or sought, or attempted to do anything by word or deed, to injure said cause or retard its success, and that he was at all times ready and willing when called upon, or if called upon to aid and assist the cause of the Union, or its supporters so far as his means and power, and the circumstances of the case permitted.

40 Claimant , of Oxford, Miss.; , of ; , of ; , of ; , of .

That by the following named persons the claimant expects to prove the taking or furnishing of the property for the use of the Army of the United States:

S. E. Ragland, of Oxford, Miss.; Warneer Price, of Oxford, Miss.; , of ; , of ; , of ; of .

The claimant now prays that the testimony of the witnesses just desig-

nated be taken and recorded at such place and at such time as the special commissioner may designate at the reasonable cost of the said claimant, and that due notice of the time and place of the taking thereof be given to the claimant or to his counsel.

Submitted on this 2d day of January, 1874.

BEM. PRICE, *Claimant.*

HOSMER & Co., *Attorneys, Washington, D. C.*

P. O. address of local attorney. "H. M. Sullivan, esq., Oxford, Miss."

(Indorsement on back of application:) No. 20490. Claim of Bem. Price, of Oxford, Lafayette Co., Miss., $9,706.00. Application to have testimony taken by Special Commissioner Marion Campbell. Approved by the Commissioners of Claims, Jan. 2, 1874, Chas. F. Benjamin, clerk. H. M. Sullivan, Att'y, Oxford, Miss. Hosmer & Co., Atty's, Washington, D. C.

41 (Remarks of special commissioner at end of depositions:) I found the witnesses in this case to be plain, straightforward men, of good practical sense and judgment, and I believe entitled to full belief. I have met the claimant and am satisfied of his truthfulness, and also as to his age. I examined the family Bible and am satisfied that it was used as the record of the family.—M. CAMPBELL, *Special Com'r.*

(Brief & endorsement on back of depositions:) No. 20490. Claim of Bem Price, of Lafayette Co., State of Mississippi, $9,706.00.

Testimony of Bem Price, page 1 and 5; H. A. Barr, page 2; T. L. Harris, page 6; S. E. Ragland, page 7 & 17; Welcome Bicard, page 8; F. A. Perry, page 11; Sam. Price, page 29. Taken by Marren Campbell, special commissioner. Actual fees and costs, $20.00.

Agents or attorneys at Washington, Hosmer & Co.

I hereby agree to pay M. Campbell, special commissioner, $12.50, twelve and $\frac{50}{100}$ dollars, for part of his actual expenses, in addition to the regular fee of $20, as marked on the back hereof.

July 2, 1874.

BEM PRICE,
By H. M. SULLIVAN,
Att'y.

42 No. 20490. The claim of Bem Price, of Lafayette Co., in the State of Mississippi.

No. of items.	Nature of claim.	Am't claimed.	Amount allowed	Am't disallowed.
1	5,000 bushels of corn	3,000	3,000	.....
2	112,000 pounds of fodder	1,120	40	1,080
3	12 mules, *a* $175	2,100	1,440	660
4	190 hogs, 150 lbs. each	2,850	1,425	1,425
5	12 sheep, *a* $3	36	36	.....
6	20 cows, *a* $20	400	340	60
7	1 mare	175	.....	175
8	50 bushels oats	25	25	.....
		$9,706	$6,306	$3,400

(Remarks:) The claimant was but eleven years of age when the war broke out. From 1856 until October, 1865, he was in North Carolina

with an uncle and attending school. His father died in 1855, leaving to claimant a farm of about 1,500 acres in Lafayette Co., Miss., eleven miles SE. of Oxford, where claimant now resides. His youth saves him from any responsibility for his political opinions during the war. He did nothing in aid of the Confederacy. It was from this farm that the property was taken in Dec'r, 1862, by Union forces. The farm was in charge of S. E. Ragland, as overseer, who was a witness. Mr. R. professes to have made a memorandum of the property at the time (it was taken), and attaches a copy of that memorandum to his deposition. We should have been much better satisfied with the original, especially as a doubt is thrown over some of the statements of this witness. We think the mare charged was his and not claimant's, and the witness Sam'l Price (colored)
43 says of the fodder, "There was a mighty big pile of it; the Yankees took two large loads of it; the balance we used ourselves for our cattle, and we had plenty of fodder until fodder comes again;" and yet 112,000 pounds of fodder is charged, and the fair inference from Ragland's testimony is that all of it was taken. Otherwise than as stated the quantity is fairly proved. In Dec'r, 1862, pork was not worth ten cents per pound. Live hogs were not worth more than one-half that price net. In Ragland's copy of memorandum he puts the fodder at 200,000 lbs.; mules, 20; hogs, 250; sheep, 15; and oats, 80 bushels. If the claim is a fair one, instead of reducing quantities and numbers to bring the claim under $10,000, to enable the claimant to take the testimony before a special commissioner, it would have appeared better if prices only had been reduced. The copy of memorandum foots up $14,060.

We recommend the payment of $6,306.

(Endorsed on back of paper:) No. 20496. Claim of Bem Price, of Lafayette Co., Miss. Summary report. Amount allowed, $6,306.

Submitted to Congress Dec'r —, 1874, by the Commissioners of Claims, under act March 3, 1871.

[Private—No. 71.]

An act making appropriations for the payment of claims reported allowed by the Commissioners of Claims under the act of Congress of March third, eighteen hundred and seventy-one.

44 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and required to pay out of any money in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned therein, the same being in full for and the receipt of the same, to be taken and accepted in each case as a full and final discharge of the several claims presented by such persons to the Commissioners of Claims under the act of March third, eighteen hundred and seventy-one, and reported to the House of Representatives under the said act, that is to say, of the State of Mississippi, to Bem Price, six thousand three hundred and six dollars.

Approved March 3, 1875.

The United States to Bem Price, of Miss., Dr.

For the amount allowed him by act of Congress, private No. approved March 3, 1875, entitled "An act making appropriations for the payment of claims reported allowed by the Commissioners of Claims, under the act of Congress of March 3, 1871..... $6,306.00

Payable in care of Hosmer & Co., present.

Treasury Department, Second Comptroller's Office, March 16, 1875. H. Spalding, clerk.

Treasury Department, Third Auditor's Office, March, 1875. James F. Green, clerk.

45 (Endorsed on back of paper:) G. D. Claim No. 36524. Sett. No. 4362. (31) E. J. M. Bem Price, $6,306. Due him out of the appropriation for claims of loyal citizens for supplies furnished during the rebellion, for amount allowed him by the Southern Claims Commissioners. Reported March 15th, 1875. Returned March 16, 1875. Requisition No. 2814, dated March 16, 1875. Transmitted for warrant March 16, 1875.

Settlement requisition No. 2814.—*Secretary of Treasury* (1048) *warrant.*

WAR DEPARTMENT, *March* 17, 1875.

To the Secretary of the Treasury:

SIR: Please to cause a warrant for six thousand three hundred and six dollars and cents to be issued in favor of Bem Price, of Mississippi, care of Hosmer & Co., present, due on settlement as per certificate of Second Comptroller No. 4362. To be charged to the undermentioned appropriation.

Given under my hand this 16' day of March, 1875.

W. W. BELKNAP,
Secretary of War.

$6,306.
S. P. P.
Countersigned March 16, '75.

J. M. BRODHEAD,
Second Comptroller.

Y. D.
Registered, March 16, '75.

ALLEN RUTHERFORD,
Third Auditor.

V. D.

46 (On the margin:) Appropriations.
Regular supplies of the Quartermaster's Department.
Incidental expenses " " "
Horses for cavalry and artillery.
Barracks and quarters.
Transportation of the Army and its supplies.

Horses and other property lost in the military service.
Subsistence of the Army.
Claim of loyal citizens for supplies furnished during the rebellion $6,306.00.

War settlement warrant No. 1048, *Treasury Department.*

To the Treasurer of the United States, greeting:

Pay to Bem Price, of Miss., cla'm Hosmer & Co., present or order, to be charged to the appropriations named in the margin, six thousand three hundred and six dollars, due on settlement, pursuant to a requisition No. 2814, of the Secretary of War, dated 16' March, 1875, countersigned by the Second Comptrol'er of the Treasury, and registered by the 3d Auditor and for so doing this shall be your warrant.

Given under my hand and the seal of the Treasury Department this 17' day of March, in the year of our Lord one thousand eight hundred and seventy-five, and of Independence the ninety-ninth.

J. F. HARTLEY,
Assistant Secretary.

Appropriations:
Claims of loyal citizens for supplies furnished during the rebellion $6,306.
L. M. M. R. C. O. W.
Countersigned 18th.
J. W. S. J. S. V., 18.

WM. HEMPHILL JONES,
Acting 1st Comptroller.

Registered.

J. A. GRAHAM,
Ass't Regist'r.

OFFICE OF THE TREASURER OF THE UNITED STATES 18.

Received for this warrant the following draft, No. 4212, on New York. 3, 18.

HOSMER & CO.

47 Know all men by these presents that I, Bem Price, do make, constitute, and appoint A. A. Hosmer and C. D. Gilmore, dong business under the name and style of Hosmer & Co., of the city of Washington, District of Columbia, my true and lawful attorney for me and in my stead to endorse in my name treasury draft No. , issued for $6,306, under the act of Congress approved March 3, 1875, and receive the amount for me.

Given under my hand and seal the 11th day of March, A. D. 1875.

[SEAL.] BEM PRICE.

Witnessed by—
HENRY VANCE.
R. PORTER.

STATE OF MISSISSIPPI,
County of Lafayette, ss:

Personally appeared before me, the undersigned, a chancery clerk in and for said county and State, Bem Price, to me well known to be the identical person who signed the foregoing letter of attorney, and the same having been read over to him and the contents thereof fully explained, he acknowledged the same to be his act and deed.

{ SEAL OF CHANCERY COURT, LAFAYETTE CO., MISS. } R. W. BLACK, *Clerk*,
By W. E. ANDREWS, *D. C.*

Draft No. B 4212, on warrant No. 1048, series of 1874, Treasury of the United States. J. O. M. L. M. M. K. C. O. W. Washington, D. C., March 18, 1875.

Pay to the order of Bem Price, of Miss., six thousand three hundred and six dollars.

Registered Mar. 18, 1875.

(Countersigned:) Paid Mar. 19, 1875. New York.

JOHN ALLISON,
Register of the Treasury.
L. R. TUTTLE,
Ass't Treasurer of the United States.

To ass't treas. U. S. New York.
86,306.

48 (Endorsed on back of draft:)

The endorsement of this draft must be technically and legally perfect, or the officer on whom it is drawn will refuse payment thereof.

COMPTROLLER'S OFFICE, *March* 18, 1875.

This draft may be paid to order of Hasmer & Co., attorney in fact. Power filed in this office.

WM. HAMILTON JONES,
Acting Comptroller.

Hasmer & Co., attorneys in fact.

HASMER & CO.

Pay Continental Nat'l Bank, N. Y., or order, for account National Metropolitan Bank, Washington, D. C.

GEO. H. B. WHITE, *Cas.*

C. F. TIMPSON,

This record filed in clerk,s office, 2d, Jan'y, 1882.

G. R. HILL, *Clerk.*

The U. S. attorney then offered to prove by record and oral testimony that the property for which said money was paid was not in fact the property of defendant, but the joint property of defendant and two disloyal brothers. To the introduction of said testimony, the defendant objected, on the ground that the finding of the Southern Claims Commission recommending the payment of said money, and the appropriation to pay the same by Congress was final and conclusive, and that a suit would not lie to recover

it, which objection; after argument of counsel, was sustained by the court and said evidence excluded from the jury; to which ruling of the
49 court in excluding said evidence from the jury, the att'y for the United States instantly excepted, and now excepts. There being no further evidence offered, the court directed the jury to return a verdict for the defendant, which was accordingly done. The U. S. attorney then entered a motion to set aside the verdict of the jury and to grant a new trial, on the ground that the court erred in excluding the evidence from the jury; which motion, after argument of counsel was by the court overruled, and a new trial refused; to which ruling of the court in overruling said motion the U. S. attorney instantly excepted, and here excepts—and to all said rulings of the court in excluding said testimony from the jury, and in overruling said motion for a new trial, the said attorney here excepts and prays that this his bill of exceptions may be signed and made a part of the record, which is accordingly done this the 2nd day of Jan'y, 1882.

R. A. HILL, *Judge*.

Filed Jan'y 2, 1882.

G. R. HILL, *Clerk*.

50 *Certificate*.

UNITED STATES OF AMERICA,
Northern District of Miss., ss:

I, George R. Hill, clerk of the district court of the United States for the northern district of Mississippi, hereby certify that the foregoing pages contain a true & perfect transcript of the papers, orders, & proceeding had in said cause in said court as fully as the same appear on file & of record in my office.

In testimony whereof I hereunto set my hand & affix the seal of said court at my office in the city of Oxford in said district, on this the 9th day of March, A. D. 1883.

[SEAL.] G. R. HILL, *Clerk*.

(Indorsement on cover:) No. 490. The United States plaintiff in error, vs. Bem Price. N. Mississippi, D. C. U. S. Filed 27th March, 1883.

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES, PLAINTIFF IN error,
vs.
BEM PRICE, DEFENDANT IN error.
} No. 210.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF PLAINTIFF.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

UNITED STATES, PLAINTIFF IN error, *vs.* BEM PRICE, DEFENDANT IN error.	No. 210.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF PLAINTIFF.

The United States sued Price in the court below, in *assumpsit*, for the sum of $6,306.46, on two counts:

First. Money had and received by defendant from plaintiff to and for the use of plaintiff.

Second. Money paid the defendant, under the act of Congress approved March 3, 1871, and special appropriation act of March 3, 1875, the same having been paid or recovered through mistake.

Plea of *non assumpsit*, and trial upon it, with a finding by the jury, under instruction of the court, in favor of Price. United States prosecuted writ of error.

On the trial the plaintiff introduced the petition of Price before the *Commissioners of Claims*, under the act of March 3, 1871, with the oath attached, and all the proceedings before that Commission, with the proof, finding of the Commission in favor of Price for $6,306.46, and the issuing of a draft and payment to Price. (Tr., pp. 5 to 23, inclusive.)

The district attorney then offered to prove, by record and oral testimony, that the property for which the money was paid was not, in fact, the property of the defendant (Bem Price), but the joint property of defendant and two *disloyal brothers*. To the introduction of that testimony Price objected, on the ground that the finding of the Southern Claims Commission, recommending the payment of the money and the appropriation by Congress to pay the same, was final and conclusive, and that a suit would not lie to recover it.

The court held that this evidence was incompetent, and sustained the objection to it; and to this ruling the district attorney excepted, and, offering no further evidence, the court directed the jury to return a verdict for the defendant, which was done; the district attorney excepting to this finding of the court. (Tr., pp. 23, 24.)

The plaintiff now assigns for error, distinctly, the ruling of the court in refusing to permit the district attorney to prove that the property for which the money was paid was not in fact the property of defendant, but the joint property of defendant and two disloyal brothers.

So the single and only question before this court is: Whether it was competent for the United States to prove that the money was paid to Price, under a mistake of the

fact of the property for which the money was allowed being his individual property?

The act of Congress (chap. 116, third session, Forty-first Congress, section 2, p. 524, 16 Stat.) provided for the payment of only such claims as were brought by "those citizens who remained loyal adherents to the cause and the Government of the United States during the war," &c. This was an essential fact upon which to base a recovery in all cases, and the affidavit of Price (Tr., p. 6) states this fact, so far as he is concerned, in the most emphatic and positive manner.

The offer of the United States, then, to produce this testimony, which was ruled out by the court below, was simply to show that there was a mistake in this case in allowing this money to Price (supposing the fact to be true as offered to be proved by the United States).

It is to be said in the outset this is not an effort to contest, review, or revise in any respect the finding of the *Southern Claims Commission*. That finding stands; it is not in issue here.

The simple fact is, that Price has received money from the United States which in justice and in law he ought not to retain, and which he obtained by his own fraud (if the testimony offered by the United States be true), for he says in his petition, which he verifies by his oath, that he is the sole owner, and was the original owner, of the claim therein made. He has money that does not really belong to him, but rightfully belongs to the United States.

Since the days of Lord Hardwicke (Barnesly *vs.* Powel, 1 Ves., sr., 289) and Lord Mansfield (Doe *vs.* Hadden, 3 Doug., 310) it has been said there is no act in law which

fraud will not vitiate. (Maxfield's Lessee *vs.* Levy, 4 Dall., 335; Welch *vs.* Mandeville, 1 Wheat., 236.)

The United States offers to show by testimony that was not reasonably in reach, or was not presumably within the knowledge of that Commission or its officers, that a fraud has been committed upon the Government, and because of that money has been paid out which would not have been paid if this fact had been known.

In Moses *vs.* McFarlan, 2 Burr., 1002, Lord Mansfield says:

> If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon a contract.

Again:

> This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged.

I know it is claimed by some that the case of Moses *vs.* McFarlan has been overruled in the United States, and O'Hara *vs.* Hall, 4 Dall., 340, is relied upon for this assertion; but the court will observe, in looking at the case of O'Hara *vs.* Hall, that it is there said that Moses *vs.* McFarlan is overruled on the principle that the previous decision, there brought into question, was pronounced by a competent court.

Here the Government brings in no question about this decision; on the contrary, this decision, upon the record, is right; but the proposition is this: Would that decision have been thus, if these facts now attempted to be proved had been before the Board of Commissioners, facts that

the Government did not then know, and could not well have known; and the United States attorney who prosecuted this case was not connected with the investigation before the Board of Commissioners.

This court in The Railway Company *vs.* Soutter, which was a case in equity, denied the relief, because the matter complained of was a mistake of law and not of fact, saying in that opinion (13 Wall., 524): "There was not a fact, therefore, of which they were ignorant;" of course intimating that if there had been a fact of which the party was ignorant, relief would have been granted. Here one of the most material facts was not known to the Government; the Government was ignorant of it, and reasonably (by the record) had no means then of ascertaining it.

It is submitted that it is the indisputable inference, from the language just quoted in 13 Wall., that the recovery here is permissible upon such a state of facts.

In Northrop *vs.* Graves, 19 Conn., 548, the court enters into quite a lengthy review of this whole question as it then stood, according to the leading English and American authorities, and lays down the doctrine in these words:

> Where money is paid by one under mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law.

Without going the full length of this decision, as to the recovery on account of a mistake of law, for that question does not arise here in any shape, it is believed that the reasoning of that case upon the question of the

mistake of fact is sufficient to sustain the offer of proof that was made by the district attorney in this case.

Clay *vs.* Clay, 13 Tex., 195, goes fully as far, if not farther, than the offer of proof in this case attempts to go. (See, too, D'Utricht *vs.* Melchor, 1 Dall., 451.) Even beyond this, and beyond the necessities of this case, I think the court will find that the following authorities extend: Cobb *vs.* Charter, 32 Conn., 358; Post *vs.* Clark, 35 *Ib.*, 339; Culbreath *vs.* Culbreath, 7 Ga., 64; Collier *vs.* Perkerson, 31 *Ib.*, 117.

The principle upon which such recovery can be had seems to be that the party paid the money without full knowledge of the facts, and that the party receiving it is not in good conscience entitled to retain it. He is not entitled to retain it because the offer is to prove that it was not his property for which the money was allowed, but the property (two-thirds of it at least) of two *disloyal* citizens.

The review of the authorities on this subject to be found in Broom's Legal Maxims (8th ed.), p. 256–61, recognizes this right, based upon these two propositions; and there is no long delay, no pretense of *laches*, on the part of the Government in ascertaining these facts and bringing this suit upon them; and it is submitted that upon this record the offer to make this proof was permissible, and the case should be reversed because it was not admitted. This is so upon the general doctrine applying to such questions (2 Robinson's Pr., 466–9; *Ib.*, 618).

Leaving the general domain of the law, let us see how the matter stands, particularly and especially under the procedure by which Price obtained this money.

Conceding to its full extent the principle that the findings or judgments of tribunals organized for special purposes are not reviewable, but are conclusive, as the judgments of courts generally are, there is very great doubt whether that principle holds in reference to the commission that passed upon this claim.

Under the very act constituting this board, it is apparent that the proceeding is somewhat of an *ex parte* character, and its work more in the nature of advice to Congress, at least, than the finding of a court, with opportunity to parties to be heard, and for the whole matter to be contested by legal proceedings proper. It would stand, necessarily, no higher than the mere finding of a committee of Congress; and as we are entitled to look into the history of the times in reference to the passage of such acts (91 U. S., 72 *et seq.*), the court judicially knows—and what the court judicially knows everybody knows—that this commission was created for the purpose, in a great measure, of relieving the committees of Congress from this tedious and laborious work.

The appropriation act of March 3, 1875 (18. Stat., part 3, pp. 645–6) is simply based upon this advice and suggestion from the commissioners; and we must bear in mind the old rule of law, as announced by Lord Coke himself, that these tribunals, boards, or whatever else you may call them, with limited and special jurisdiction, "are very strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant." (2d Bl. Com., Bk. 3, p. 85, Cooley's edition; 7 Robinson's Pr., 16–21; *Ib.*, 67–69.)

With this principle in view, let us see now if we have

not a precedent justifying in every respect what the plaintiff claims here.

On March 13, 1777, Congress, by resolution, provided for the organization of a board of three commissioners, to examine claims that might be presented against the United States, and gave certain directions therein, and amongst other things required them to certify the sums to be allowed to the Auditor-General, to be by him reported to Congress. (Journals of Congress, vol. 2, p. 56; from 1777 to 1778, inclusive.)

On April 19, 1781, on the motion of Mr. Duane, from New York, reciting that certain differences had arisen between the quartermasters and commissaries and persons claiming to be the creditors of the United States for articles furnished by or taken from them, &c., it was resolved that every such claim be referred to the Continental commissioners for auditing and adjusting accounts. (*Ib.*, vol. 3, p. 612, from 1778 to 1782, inclusive.)

This resolution of Mr. Duane made provision for an allowance and payment, or certificates, in like manner as directed by the act of August 26, 1780. The act of August 26 made provision for the settlement of certain accounts by payment, or by certificate to be given according to the directions contained in the resolution of June 12, 1780. (*Ib.*, p. 514.)

The resolution of June 12, 1780, provides for two extra chambers of accounts, consisting of two commissioners each, and contains certain directions to them in the transaction of their business. (*Ib.*, p. 465.) Further provision was made by resolution of February 20, 1782, in reference to the settlement of these claims by commissioners (*Ib.*, p. 721 *et seq.*); also by resolution of

June 3, 1784, with regard to the character of vouchers and other evidence to be produced to support the claim. (4 *Ib.*, p. 442.)

In going through these different resolutions or acts, the court will see that, except in phraseology, there is no difference between the powers conferred on what is called the Continental Commissioners and those given to the Southern Claims Commissioners under the act of March 3, 1871. The Continental Commissioners, as the Southern Claims Commission, had full power, under the rules and regulations to be prescribed by themselves, to hear and determine claims, and to report to Congress.

One Thomas Fenemore, having a claim that came under the class recognized by these different resolutions or acts, for the sum of $4,273.49, had it allowed, and certificate given, and he funded that certificate in the funds of the United States, and became a holder of the stock, amounting with the interest to $4,893.08; and the certificate was given up and cancelled. He received from time to time some payments upon that stock, but afterwards the United States discovered that the claim was unjust and should not have been allowed, and sued Fenemore for the amount of the claim which had been allowed him.

These facts all appeared at the trial, and notice was taken particularly of the regulations made by Congress by the resolutions or acts of February 20, 1782, and June 3, 1784, already referred to. The court held that the United States was not estopped by this finding of the commissioners, or by the payment of the money, but that the question of the merits of the account was subject to be heard in the suit; and a judgment was rendered against

Fenemore for that amount. He appealed, and on appeal the judgment was affirmed (Fenemore *vs.* United States, 3 Dall., 357.). Each of the judges delivered an opinion for himself.

Chase, Justice, speaking first, said:

> The judgment of the circuit court ought to be affirmed. Here is the case of a plain fraud. A man sets up a claim, exhibits colorable vouchers to support it, deceives the public officer, obtains a certificate that his claim is just, and finally converts that certificate into transferable stock. The transaction is rank from the beginning to the end, and the jury have properly found, not only the fraud, but the value of the certificate obtained by it. * * * Surely it ought never to have been a subject of argument in a court of justice whether, on stating a manifest fraud practiced upon the public credit and Treasury, the United States is entitled to recover an equivalent for the pecuniary injury from the avowed delinquent (*Ib.*, 363).

Iredell, Justice, stated he was "clearly of the same opinion," and said further:

> The defense is indeed an extraordinary one; it is an attempt to make the very act of fraud an instrument or shield of protection. But I trust no man will ever be able to defend himself in an *American* court of justice upon the ground of his own turpitude (*Ib.*, 365–4.)

Cushing, Justice, next: "The cause is susceptible of little doubt" (*Ib.*, 364).

Elsworth, Chief Justice, following, was of the same opinion (*Ib.*, 364).

And last, Patterson, Justice, who sat at the trial below, was afforded "pleasure in being relieved from the neces-

sity of delivering any opinion on the present occasion" (*Ib.* 364).

It would be extremely difficult, if not impossible, to furnish any reason why the United States could not inquire into the fraud, in this case, in procuring this allowance, when it was inquired into in the Fenemore case. There is no substantial ground for discrimination between the two cases.

The plain English of it is, that Price justly owes the United States this sum of money. Shall he be permitted to retain it? Under repeated adjudications, were he an officer of the Government, or had he in any capacity a legitimate claim against the Government now, the Government could offset this amount, I take it, against that claim; and this suit can justly be brought for the recovery of that amount, and maintained upon the evidence offered to be produced below. (Bonnafon *vs.* U. S., 14 Court of Claims, 484; U. S. *vs.* City Bank, 6 McL., 130; U. S. *vs.* Buford, 3 Pet., 12; U. S. *vs.* Inhabitants of Waterborough, Davies (Dist. Me.), 154; U. S. *vs.* Bartlett, *Ib.*, 9; U. S. *vs.* Ferreira, 13 How., 40.)

Finally, is not the principle announced in McElrath *vs.* United States, 102 U. S., 426, allowing the United States to recover moneys improperly paid McElrath, the same that is involved here? And does it not permit the United States to recover in this instance? And is not this finding of this special Board impeached within the rule laid down in Kaufman's case, 96 U. S., 567?

Respectfully,

A. H. GARLAND,
Attorney-General.

Office Supreme Court U.S.
FILED.
JUN 21 1884
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BEM. PRICE.

In Error to the District Court of the United States for the Northern District of Mississippi.

BRIEF FOR DEFENDANT IN ERROR.

This was an action of assumpsit by the United States to recover from Bem. Price $86,306\frac{46}{100}$, which he had received upon a claim allowed to him by the board of commissioners appointed under the act of Congress "approved March 3, 1871."

The board of commissioners were authorized and directed "to examine and consider the justice and validity of such claims." The act requires that the commissioners should be "satisfied from the testimony accompanying the claim." The act provides that two members of the board should constitute a quorum for the transaction of business, and that the agreement of two should "*decide all questions in controversy.*"

The decision of the board of commissioners by which the

said sum of $6,306 was allowed to Price has never been set aside. The court below decided that the decision of the board of commissioners was conclusive, and that the money could not be recovered back in action of assumpsit for money had and received whilst the decision was in force.

The decision of this board of commissioners was in effect a judgment, having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction. The authority of the board was judicial and its determination was conclusive.

Freeman on Judgments, sec. 531.
United States *v.* Arredondo, 6 Peters' R., 730.
Comegys *v.* Vape, 1 Peters' R., 212.
Strother *v.* Lucas, 12 Peters' R., 438.
Lynde *v.* The County, 16 Wallace's R., 13.
Secombe *v.* Railroad Co., 23 Wallace's R., 119.
Martin *v.* Mott, 12 Wheaton, 31 and 32.
County of Tallahatche *v.* Carbry, 3 Smedes & Marshall's R. (Mississippi), 547.
Moses *v.* McFarlan, Burr's Rep., 1005.
Moody *v.* Thurston, Strange's Rep., 481.

The same principle of conclusiveness applies to awards of arbitrators.

Freeman on Judgments, sec. 320.

Where judgment has been recovered before a competent court, the party paying that judgment cannot recover the money back in another action while the judgment remains in force.

Freeman on Judgments, sec. 286.
Smith *v.* Lewis, 3 Johnson R., 168.
Willen *v.* Sprout, 2 Gray, 431.
Kirkland *v.* Brown, 4 Humphreys (Tenn.), 174.
Bremson *v.* Bacon, 1 Root (Conn.), 210.
Morton *v.* Chandler, 7 Greenleaf (Me.), 45.

Loving *v.* Mansfield, 17 Mass. R., 396.
Carter *v.* Canterbury, 3 Conn., 461.
Homer *v.* Fish, 1 Pickering, 439.
Peck *v.* Woodbridge, 3 Day (Conn.), 36.
Gordon *v.* Mayor of Baltimore, 5 Gill (Md.), 231.
Cobb *v.* Curtis, 8 Johnson R., 470.
White *v.* Ward, 9 Johnson R., 232.
Job *v.* Collin, 11 Ohio, 422.

There is no fraud alleged in this case. The declaration does not allege anything that amounts to fraud—surely nothing that constitutes such fraud as would authorize a court of equity to set aside the decision of the board of commissioners.

A court of equity will not go into the merits of an action for the purpose of detecting and annulling the fraud, nor will it set aside a judgment for any fraudulent or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. A judgment will only be set aside as fraudulent when, by reason of something done by the successful party, there was in fact no advisory trial or decision, or where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practised on him by his opponents.

This is the only admitted exception to the firmly established maxims of the law, designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicæ, est sib finis litium, and nemo debet bis vexari pro una et eadem causa.*

United States *v.* Throckmorton, 98 United States (8 Otto) Reps., 65 and 66.

J. Z. George,
Counsel for Benj. Price.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

BROOKE MACKALL, JR., *Appellant*,
vs.
ALFRED RICHARDS.
No. 999.

Motion to Dismiss or Affirm.

Comes now the appellee, Alfred Richards, by his counsel, and moves the Court to dismiss the appeal in this cause for the reason that the decree of the Supreme Court of the District of Columbia, from which said appeal was taken, was by that Court entered in accordance with, and in execution of, the mandate of this Court, issued on a previous appeal and directed to that Court; or if the said appeal shall not be dismissed, that the said decree of the said Supreme Court of the District of Columbia be affirmed, on the ground that, although in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that said appeal was taken for delay only, and that the said question on which the jurisdiction depends, is so frivolous as not to need further argument.

WM. B. WEBB and
ENOCH TOTTEN,
Counsel for Appellee.

Statement of Facts.

The above entitled cause was before this Court at the last term. (*Mackall* vs. *Richards*, 112 U. S., 369). The mandate was issued on or about the 9th day of April, 1885, and was presented to the Supreme Court of the District of Columbia on or about the 6th day of May, 1885. The said Supreme Court of the District of Columbia, in and by the said mandate, was directed as follows:

> "It is now here ordered, adjudged and decreed by this Court, that the decree of the said Supreme Court, in this cause, be, and the same is hereby reversed with costs; and that the said defendant, Brooke Mackall, Jr., recover against the said complainants, seventy-three dollars and twenty-six cents for his costs herein expended, and have execution therefor.
>
> And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court with the directions to set aside the decree from which this appeal is prosecuted, and to order the sale in satisfaction of complainant's demands, and in such mode as may be consistent with the practice of the Court and with law, of all of lot seven (7) outside of that upon which the building known as the Palace Market stands."

In obedience to the directions of this Court, as contained in the said mandate, the Supreme Court of the District of Columbia, in General Term, did, on the 13th day of July, 1885, enter a decree in the words and figures following, to wit:

> "This cause coming on to be heard, and it appearing that the decree hereinbefore passed by this Court on the 5th day of April, 1881, has been reviewed by the Supreme Court of the United States upon appeal, and that that Court by its mandate sent to this Court and now filed herein, has ordered and adjudged

that the decrees so as aforesaid passed in this cause shall be reversed and set aside, and that this Court shall proceed to make an order for the sale of all of lot seven (7) in square numbered two hundred and twenty-three (223) in the City of Washington in the District of Columbia, outside of that upon which the building known as the Palace Market stands. Now it is by this Court in General Term, proceeding to execute and carry into effect the mandate, and order of the Supreme Court of the United as aforesaid, ordered, adjudged and decreed, that all of lot numbered seven (7) in square numbered two hundred and twenty-three (223) in the City of Washington, outside of that upon which the building known as the Palace Market stands shall be sold, and that William B. Webb be, and he is hereby appointed trustee to make such sale; and that his order of proceeding shall be as follows: first, he shall file with the clerk of the Court his bond to the United States with sureties to be approved by the Court, or one of the judges thereof, in the penalty of thirty thousand dollars, conditioned upon the performance of the duties imposed upon him as trustee by this decree, or which may be imposed upon him by any further order of this Court; next, he shall take possession of the said property so decreed, to be sold, to wit, all of lot seven (7) in square numbered two hundred and twenty-three (223) in the City of Washington, outside of that upon which the building known as the Palace Market stands, and shall proceed to sell the same upon the premises, at public auction to the highest bidder, first giving public notice of the time, place and terms of such sale in some newspaper, published in the City of Washington three times a week and on the day of the sale, the first publication of such notice to be inserted in said newspaper at least two weeks before the said day of sale, the terms of said sale to be as follows: one-third of the purchase money to be paid at the time of the sale, and the remaining two-thirds in equal payments in one and two years after the date of said sale, the said deferred payment to bear six per cent. interest per annum, and to be secured to the satisfaction of the said trustee; next he shall, as soon as convenient after such sale,

make a full and true report thereof to this Court, with an affidavit of the truth thereof, and of the fairness of said sale annexed. And on the ratification of such sale by the Court, the said trustee, by good and sufficient deed, shall convey the said part of lot to the purchaser thereof, freed and discharged from all manner of claims thereto on the part or behalf of the parties to this cause or any or either of them; and the said trustee shall bring into this Court the money arising from such sale and the notes representing the deferred payments therefor, to be disposed of under the direction of this Court, after deducting therefrom the costs of this suit and such commissions thereon as the Court shall think proper to allow to the trustee for his services in and about this trust."

On or about the 18th day of May, 1885, the appellant, Mackall, who was a *defendant* in the Court below, applied to that Court for leave to file a paper which he denominated a "supplemental bill," being the document set forth in the transcript of the record in this appeal.

By this proposed collateral proceeding, he prays a delay of the execution of the mandate until the cause shall have been referred to the Auditor to state and report an account of the rents which have been collected during the litigation, and to ascertain and report the amount of the judgments which continue as a lien upon the property. By the averments in this proposed "supplemental bill," he advises the Court of various new defenses by which he hopes or expects to reduce the amount of the indebtedness, chief among them being the Statute of Limitations.

The Court below did not grant him leave to file his "supplemental bill," but, instead, proceeded to execute the mandate of this Court by entering the decree from which the appeal in this cause was taken.

Points and Authorities.

An appeal from a decree entered in accordance with the mandate of this Court upon a previous appeal will be dismissed on motion.

Humphrey vs. *Baker*, 103 U. S., 736;
Stewart vs. *Salomon*, 97 U. S, 361;
U. S. vs. *Fremont*, 18 Howard, 30.

The decree of July 13th, entered by the Court below, was, in effect, the decree of this Court, and the Court below was without authority to enter any other decree or to delay execution of the mandate. The Court below was, therefore, without authority to grant the relief prayed for by the new pleading offered, or to permit such bill to be filed, even if it had been disposed so to do. This was an attempt to file new pleadings and introduce new defences. Nearly the same practice was resorted to in the case of *Stewart* vs. *Salomon*, and in *Humphrey* vs. *Baker*, above cited. In the latter case this Court commanded that a conveyance of certain premises be made. In this it commanded that a sale of certain premises be made. The language of the Court, in speaking of the effect of the mandate in that case, is peculiarly applicable here. The court said:

> "It (the mandate) commanded Humphrey to convey, and the proceedings in which the order now appealed from were for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the Circuit Court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express direction, and may, with propriety, be considered part of our decree."

It seems plain to us that this appeal was taken solely for delay; we think a very slight inspection of the transcript of

the additional record sent up will convince the Court of this.

Upon the second branch of our motion we invite the attention of the Court to the following authorities:

Hinckley vs. *Gaston*, 103 U. S., 764;

Whitney vs. *Cook*, 99 U. S., 607;

Micas vs. *Williams* 104 U. S. 556.

We submit to the Court that the appeal should be dismissed, or that the decree appealed from should be affirmed upon the authority of the 5th paragraph of Rule 6.

WM. B. WEBB and
ENOCH TOTTEN.
Counsel for Appellee

116 75

DEC 8- 1885

Supreme Court of the United States.

OCTOBER TERM, 1885.

BROOKE MACKALL, JR., APPELLANT,
vs.
ALFRED RICHARDS ET AL. APPELLEES.
} *No.* 999.

Brief of Appellant on Motion to Dismiss Appeal.

W. WILLOUGHBY,
Counsel for Appellant.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

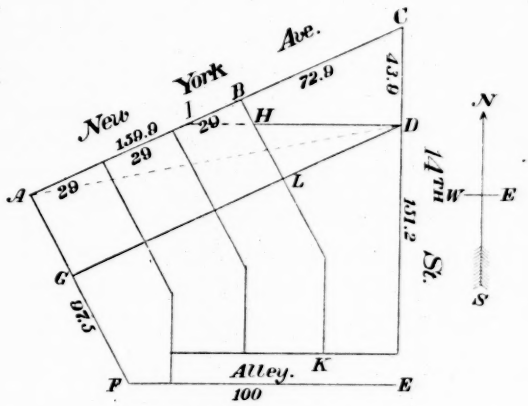
Supreme Court of the United States.

BROOKE MACKALL, JR., APPELLANT,
vs.
ALFRED RICHARDS ET AL., APPELLEES.

No 999.

Brief of Appellant on motion to dismiss Appeal

The controversy in this case relates to property on the southwest corner of 14th street and New York avenue, in Washington city, of which the following is a diagram:



The complainants, Richards and others, filed a creditor's bill setting up several liens and judgments, to subject all that part of the lot not before sold by the marshal to the payment of such liens and judgments, praying that an account may be taken thereof, and the land sold to satisfy them. Prior to the filing of the bill, Richards had attempted to sell under alleged mechanics' liens the part on which the building *B C D H* stood, and claimed that such sale embraced all lying north of the line (*G D.*) The bill, however, did not make this particular description, but referred to the property only as that part of the lot "not heretofore sold by the marshal," and the first decree, May, 1873, without taking the account prayed for, adjudged that the property not heretofore sold by the marshal should be sold to pay such judgment liens.

This decree was affirmed by this court and a mandate issued directing such sale to be made. In the execution of the decree made in pursuance of such mandate it was ascertained that there was a question of the northern boundary of the lot to be sold; and for such reason the court below directed that before the sale such boundary should be ascertained. This was sought to be done. The Special Term decided the northern boundary of the property to be sold to be parallel to New York avenue, but upon appeal the General Term directed a sale without deciding such question of boundary; whereupon an appeal was taken to this Court, and here the decree of the General Term was reversed, and proceeding to ascertain the boundary, it was held that the northern line should run directly west from a point forty-four feet south of the northeastern corner of the lot on the line *D I.*

This case is reported in 112 U. S., p. 369, and the Court is invited to examine the record in that case for a full history of what had been done up to that period.

That case involved only two questions: 1st, whether it was right to sell the property without ascertaining such northern boundary; and, second, what was such true boundary.

The main ground for the reversal of the decree of the General Term was, that from the peculiar shape and situation of the property it would be a needless sacrifice of the property to sell only that portion and leaving a part with an uncertain title.

This same ground still exists, but this Court could not, with the case *as it then stood*, do more than to define the boundary of the part sold by the marshal, assuming that such sale was valid. In its opinion, however, the Court referred to the fact that there was a pending suit as to the validity of such sale, and expressly and clearly saying that no opinion or decision was given as to such validity. The record will now show that the court of the District in general term has adjudged such sale to be invalid and void, which would, if sustained here, determine the boundary line to be on New York avenue itself. (See 3d Mackey, 271.) This question is now pending in case No. 699 on the calendar of this Court.

The record and the opinion in 112 U. S. will show that it was not the intention of the Court to direct absolutely a sale of the part of the lot defined in the decree without reference to what might be shown by facts not then in the case, and which did not exist when the original decree was made, and could not therefore be passed upon. If so, it would repeat the very same injustice it was designed to prevent and for which the former decree was reversed, namely, the selling of the part of the lot with an uncertain boundary line.

We now ask the application of the principle as stated in the syllabus in that case:

"When a mandate of this Court made after hearing and deciding an appeal in equity directed such further proceedings to be had in the court below *as would be consistent with right and justice*, and that court thereafter made a decree which prejudiced the substantial rights of a party to the suit *in respect of matters not concluded by the mandate or by the original decree*, its action touching such matters is subject to review upon a second appeal."

The Court then applied this principle to a state of facts in existence at the passing of the first decree, and which might have been determined had the attention of the Court been called to it. In the case *now* before the Court the new questions arise upon facts not in existence at the time of the decree complained of, and which therefore could not have been considered by the Court, presenting a much stronger case for the application of the principle stated than even the case determined in 112 U. S.

In Hinckley *v.* Morton, (103 U. S., 764,) cited by counsel for appellee, it said: "Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself."

In Humphrey *v.* Baker, (103 U. S., 736,) cited by counsel in their brief, this Court had commanded to be done a precise and definite act.

As was stated, "no discretion was given the circuit court as to requiring a conveyance." Besides, what was filed in that case was not a bill of supplement. It differs from this case, in that it did not set up any matter arising *after* the decree of the court below, but it was a matter of defence which might have been set up against the bill before the original decree.

But in 112 U. S., 369, this Court gives some force and meaning to the words, "according to right and justice,"

and admonishes the inferior courts that they are not to blindly follow the literal terms of the mandate, without reference to such facts as may subsequently appear to be demanded by *right and justice*.

If, for example, a sale is directed to satisfy certain judgments, and it appears that subsequently to the decree affirmed such judgments have been paid and satisfied, the lower courts are not required to still direct a sale because of such mandate.

And yet that is precisely the case now before the Court. The court below, although informed by what we denominate a supplemental bill, verified by oath and by an affidavit describing fully such payment, felt itself obliged to direct a sale simply because of the mandate; and this is now the claim of the counsel for appellee.

The bare statement of such a position must be sufficient to show its absurdity. The mandate of this Court is, that the court below "order the sale in satisfaction of complainant's demands, and in such mode as may be consistent with the practice of the court and with law."

This certainly would allow the court below, upon allegations of payments properly made, to ascertain in some way whether the judgments were paid either in whole or in part, and to ascertain the amount of the liens, which has never yet been done, although the complainant's own bill prays for an account of liens.

It certainly is "according to right and justice" and "consistent with the practice of the court and with law" to ascertain the amount of liens for which property is to be sold before the sale be actually made.

We claim that this should be done. We are helpless to prevent a sale by payment, even if there were liens to be paid, until this be done.

In the pending case, No. 699 upon the calendar of this

Court between these same parties, *this was decreed to be done.*

To that extent, at least, that case and this were consolidated. And yet we cannot proceed to take such account, because that decree has been superseded by the appeal. Our hands are tied by this appeal by this same appellee, and now he demands a sale without the taking of such account ordered in that case, and although we have alleged without denial that the judgment liens have been paid and satisfied.

The decree is of an unusual and oppressive character in directing the trustee to take possession *before the sale*, and in this respect does not accord with the mandate.

This might be for a considerable period from the time of the decree until a sale should be made which would be confirmed.

Besides, it refused to appoint anyone trustee of sale but the counsel for complainant, Richards.

It will be observed that the decree complained of was made by the General Term, instead of remanding the further execution of the decree to be made by the Special Term.

By the decree the trustee is required to make his report to the General Term, where all questions of ratification of the sale, accounts to be taken, and disposition of the proceeds of sale are to be made.

This decree is erroneous in these respects, and is not in conformity with the mandate for these reasons. The defendant has the right, according to the practice of the Court, to a decision of the Special Term upon these important questions, with the right of appeal therefrom to the General Term, a most valuable right, and to have such right expressed in clear and definite terms. As the decree

now is, if in taking the account of liens the Court makes an error in the first instance, there is no power of review if the amount in controversy is less than $5,000.

The case shows that, before the decree in General Term was made, a supplemental bill was filed by this defendant.

But the General Term held that it could take no notice of this, because it was not before it, such filing being in the lower court, and not coming to the General Term upon appeal. When the court in special term is called upon to take action upon it, it declines, for the reason that the General Term has made a peremptory order for the sale of the property and retains all control of the case, and therefore refuses to suspend the order. All this complication might have been avoided if the General Term had remanded the cause to the Special Term for the execution of the decree. Then, when the supplemental bill was filed, the court would not have been embarrassed as it was, and as it stated, by this order made in general term.

The counsel says the court did not grant the appellant leave to file the supplemental bill. The bill had been filed in the court below, but as in the consideration of the court it was not before it at all, it neither granted nor refused it.

There is no necessity for leave to file a supplemental bill, or at least to file in some way the proofs of payment of the judgments. A party has the absolute right to set up in some way facts that have occurred since the decree that would constitute sufficient reasons why such decree should not be enforced, and for this purpose a defendant may file a supplemental bill. (2 Dan. Ch. Pr., 1336, and notes *id.*; p. 1523; Story's Eq. Pl., Sec. 337*a*; Min. Co. *v.* St Paul Co., 2 Wall., 633.)

This is not in the nature of a bill of review which is al-

lowed upon newly-discovered evidence or for error upon the face of the decree or proceedings, and which could perhaps be allowed by this Court and which would require leave of the Court.

The setting up of such subsequent facts is not in any sense a new defence or an impeachment of the decree. In this case the appellant would not seek to impeach the decree of this Court, for it was a decree obtained upon his own motion and one which he himself sought.

As the case then stood, no other decree could be properly made.

But it is the existence of the new facts occurring since the former decree was made, and which could not according to any known rule of practice be introduced into that case while pending in this Court, that gives to the appellant the right to relief which it was impossible for this Court, without such facts before it, to grant.

If it be claimed that the General Term and the Special Term are the same court, and that for that reason the decree of the General Term in directing all subsequent proceedings to be executed by what it calls "this court" is right, then for the same reason we claim that the supplemental bill filed in the Supreme Court should have been considered as before it in General Term. If the General Term perform the functions of the Special Term, it should have acted as the Special Term would have acted concerning this supplemental bill, had it not been embarrassed by the order made in general term.

The statement of the supplemental bill by the counsel for appellee in his brief is very imperfect. He says that the appellant simply prays a delay of the execution of the mandate until an account of the rents collected during the litigation and of the judgments which continue to be a

lien can be taken, and that various new defences are set up, by which it is expected to reduce the amount of indebtedness, chief among them being the statute of limitations.

We must say, with all due respect, that the counsel has entirely failed to comprehend the scope and tenor of the claim of the appellant. This bill avers, among other things, that since the decree before appealed from of the court, of May 5, 1881, a suit in equity was commenced by appellant against appellee to set aside such marshal's sale; that in such suit the court in General Term adjudged such sale to be void, and directed an account to be taken of rents, and profits, and also expenditures by Richards, setting forth the decree, and directing also an account to be taken of Richards' claim as judgment creditor, he being the owner of nearly all the judgments upon which the original bill was filed which had not been specifically paid and satisfied. This case is reported in 3 Mackey, 271. It describes a number of the judgments which have been paid and satisfied. It claims that if the marshal's sale be held to be void, then a question will arise as to how much of his judgment should continue to be a lien upon the lot, he having applied the proceeds of sale to other judgments which are disputed; and how much it should be reduced by rents and profits due from him, he having received rents of over $20,000, which would much more than satisfy all judgments held by him. It denies the validity of what are styled "certain other judgments prior in date to those recovered by complainant," and which he claims to have paid, and claims that they were not paid by request of appellant, and that they are barred by the statute of limitations.

It sets up a large accumulation of taxes since the original decree which were assessed against the whole lot, without discriminating between that part alleged to be

sold by the marshal, and the remainder of the lot. That for the taxes upon New York avenue certificates have been issued to other parties, but claimed by the supplemental bill to have been paid, though they are claimed by such parties and by the District of Columbia to be unpaid and existing liens, and that they therefore constitute a cloud upon the title, and are chargeable against the whole lot, while if the marshal's sales, as claimed, were valid, the remainder of the lot should not be charged with them at all, at least as to the improvements in front of the part so claimed to have been sold.

That since the original decree, the appellee, Richards, has allowed the whole lot to be sold for taxes, and that he obtained a tax deed therefor, valid upon its face, which constitutes a cloud upon the title, though illegal and void in fact, which would give him a great advantage over other bidders at a public sale.

For these and other reasons given, it prays that an account may be taken of the amount of the liens, and that the title may be made clear before a sale be made. It claims that, in view of the fact that since the original decree in a suit between these parties the marshal's sale has been adjudged to be invalid and void, for which reason there would be no such dividing line between the property then alleged to have been sold and the remainder, such sale should not be made until this question be finally determined. As was said by the court in that case, (3 Mackey R., 271 :)

"This subdivision of the lot by the marshal was an *utter destruction of the property.*

"The most valuable frontage of this ground is on New York avenue. The marshal undertook to take a slice from the whole front on the north, making it front on the side of the lot, which was *fatal to the market value of the*

property and would necessarily cause the sale to be made at a great sacrifice."

These facts were not before this Court when it directed its mandate. They *are* before it now. Surely this Court will not allow this needless sacrifice, so well portrayed by the very court which has now decreed it to be perpetrated. The Court will notice that no account of the liens has ever been taken, although prayed for in the bill. This has steadily been sought for by this appellant, but has never yet been granted. If delay arises from this, it is not his fault. This account is obliged to be taken at some time, and the dispute is only *whether it be taken before or after the sale.*

It would seem that this Court had this in view when it reversed the decree before made.

It did not, as it might easily have done, simply correct the boundary line and then affirm the decree so modified, but it *reversed the decree out and out*, with the appointment of trustees, the specific terms as to the sale and all its provisions relating thereto, so that certainly there is now nothing in the way of taking the account, if there were before.

This would seem to indicate that the intention was simply to determine what property should be sold as the case then stood, and assuming the marshal's sale to be valid, and to allow the court to make such sale according to right and justice, and in such mode as may be consistent with the practice of the court and with law; that is to say, first, to ascertain the amount of the liens, and second, the land to be sold, as it may appear by the facts subsequently to be brought before it, and especially by the final determination of the suit it referred to in its opinion, being No. 699, now pending in this Court.